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Supreme Court of the United States

October Term, 1975

No. 75-1409

ST. REGIS PAPER COMPANY,
Petitioner,

vs.

THOMAS R. McMILLEN, Judge, United States District Court for the Northern District of Illinois, Eastern Division,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, St. Regis Paper Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered March 4, 1976.

CITATIONS TO OPINIONS BELOW

The judgment of the Circuit Court of Appeals for the Seventh Circuit is embodied in the Order of March 4, 1976, without opinion, and is printed in the Appendix A to this Petition. This Order has not been published.

That Order of March 4, 1976 denied a Petition For Writ Of Mandamus To Honorable Thomas R. McMillen, United States District Court Judge, Northern District Of Illinois, Eastern Division, of which a copy is printed in Appendix B to this Petition.

That Petition for a Writ of Mandamus was based upon a Decision on Motion to Remand dated November 7, 1975 of the Honorable Thomas R. McMillen, Respondent. That Petition sought to have District Judge McMillen vacate his order of remand in the decision of November 7, 1975. That decision has not been published and a copy of it is printed as Appendix C to this Petition.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on March 4, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. May Petitioner's right under Federal statutes to have its right of removal to the United States District Court for trial there of an action pending in the Cook County, Illinois, Circuit Court (there being shown in the record the required Federal jurisdiction), be denied by an action of the State court?

2. Upon all of the evidence of record, and of which there is no dispute, establishing diversity of citizenship between the parties (and required amount in controversy) at the time of removal from a State Court to the United States District Court, may a removed action be properly

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remanded by the District Court to the State Court upon the basis of erroneous and tardy rulings by the State Court in respect to the citizenship of the parties?

3. When an action was not removed "improvidently and without jurisdiction" to a District Court from a State Court, may the District Court under the provisions of 35 U.S.C. 1447(c) nevertheless remand the action to the State Court on the basis of conduct of the State Court?

4. Is not the March 4, 1976 denial, without opinion, by the Seventh Circuit Court of Appeals of a Petition for Writ of Mandamus seeking to have vacated the erroneous order of remand entered by the District Court, a denial in conflict with the January 20, 1976 decision of this Supreme Court in *Thermtron Products, Inc. et al. v. Hermansdorfer, Judge, United States District Court for the Eastern District of Kentucky*, No. 74-206 (not yet officially published but appearing in the United States Law Week of January 20, 1976, Volume 44, No. 28), holding that a Court of Appeals has jurisdiction to issue a Writ of Mandamus to correct and remedy a remand order although the case has not been removed improvidently and without jurisdiction, the only basis for a remand under the provisions of 28 U.S.C. 1447(c)?

5. Is the denial to the Petitioner of a right of review by "appeal or otherwise" of the order of remand to the States Court of an action involving a citizen's right of access to the Federal Courts in a diversity case, while expressly permitting such a review by "appeal or otherwise" in instances in which the removed action involves a citizen's "civil rights" generally, as set forth in 28 U.S.C. 1447(d), a deprivation of equal protection of the laws extended to citizens under the Fifth Amendment to the Federal Constitution assuring due process of law for all citizens, as such Fifth Amendment has been construed by the decisions of this Supreme Court?

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional Provisions are:

Article III Section 2, Clause 1 of the United States Constitution providing that the judicial power of the United States "shall extend to all Cases, in Law and Equity, * * * to controversies * * * between Citizens of different States."

Amendment V to the United States Constitution providing that "No person * * * shall be * * * deprived of life, liberty or property without due process of law * * *".

Section 2, Clause 1 of Article III and Amendment V to the Constitution, are printed as Appendix D to this Petition.

The relevant statutory provisions are:

28 U.S.C. 1332, providing that the United States District Courts "have original jurisdiction of all civil actions where the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States".

28 U.S.C. 1441(a), providing that any civil action brought in a State court of which the District courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the District court of the United States for the district and division embracing the place where such civil action is pending.

28 U.S.C. 1443, providing for removal from the State court to a District court of actions involving so-called "civil rights" of citizens.

28 U.S.C. 1446(a), providing for the removal of a civil action from a State court to a District court of the

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United States by filing a verified petition containing a statement of the facts showing the basis for the removal, accompanied by copies of the papers in the State court.

28 U.S.C. 1446(b), providing that the petition for removal shall be filed within thirty days of the service on the defendant of the initial pleading, or if the case is not then removable, thirty days after the action becomes removable as evidenced by papers or rulings in the State court.

28 U.S.C. 1447(c), providing that thereafter, upon it appearing to the District court that the case was removed improvidently and without jurisdiction, the District court shall remand the case, and the State court may thereafter proceed with such case.

28 U.S.C. 1447(d), providing that remand orders of the district court are not reviewable by appeal or otherwise except remand orders in civil rights cases removed pursuant to 28 U.S.C. 1443.

Printed as Appendix E to this Petition are copies of the above United States statutes:

28 U.S.C. 1332; 28 U.S.C. 1441(a); 28 U.S.C. 1443; 28 U.S.C. 1446(a); 28 U.S.C. 1446(b); 28 U.S.C. 1447(c); and 28 U.S.C. 1447(d).

Section 450.53 of the Michigan Corporation Act providing for the legal extinction of the merged corporation and the survival of the corporation into which it was merged, with the surviving corporation succeeding to the assets and liabilities of the merged corporation. A copy of this Michigan statute is printed as Appendix F to this Petition.

STATEMENT

1. The Petitioner, St. Regis Paper Company, is a corporation of the State of New York, having its principal place of business at New York, New York.

2. On or about January 17, 1974, an action for alleged wrongful appropriation of a trade secret (since admitted to be disclosed in issued patents) was filed as Case No. 74 CH 321 in the Cook County, Illinois, Circuit Court, by *The Upgrade Corporation and American Pulp Corporation versus Michigan Carton Co.* Michigan Carton Co. was then an existing Michigan corporation, The Upgrade Corporation was an Illinois corporation, American Pulp Corporation was a Michigan corporation. Later, Bud Bender, a citizen of Michigan and president and owner of both The Upgrade Corporation and American Pulp Corporation, was added to the case on the same side of the controversy as The Upgrade Corporation and American Pulp Corporation.

3. On or about February 15, 1974, the original defendant, Michigan Carton Co., filed a Petition for Removal in the District Court for the Northern District of Illinois, Eastern Division (embracing Cook County) on the basis of there being diversity of citizenship between the parties to the controversy, it not then being known that The Upgrade Corporation, an Illinois corporation, also had its principal place of business in Michigan and hence was also a citizen of Michigan under the provisions of 28 U.S.C. 1332(c). Thereupon, the case was remanded by the District court, without opinion, on or about July 8, 1974 to the State court.

4. On December 31, 1974, the said original defendant, Michigan Carton Co. (having theretofore been a subsidiary

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of St. Regis Paper Company), was merged with St. Regis Paper Company, the Petitioner herein. As a result of said merger, St. Regis Paper Company, the New York corporation, became the sole surviving corporation, and the original defendant, Michigan Carton Co. that had been a Michigan corporation, became extinct as of December 31, 1974. Upon said merger, St. Regis Paper Company succeeded to all the assets and all of the liabilities of the former Michigan Carton Co., and stands in the place and stead of the former Michigan Carton Co. Copies of the Certificate of the Secretary of State of New York of the Merger of Michigan Carton Co. into St. Regis Paper Company under the laws of New York, and a copy of the Certificate of the Director of the Michigan Department of Commerce of the Merger between Michigan Carton Co. and St. Regis Paper Company, a New York corporation, which is the surviving corporation, are printed as Appendix G and Appendix H, respectively, to this Petition.

5. The original claim against Michigan Carton Co. persists after said merger and the right to pursue such claim was not lost by the merger. Under the laws of the State of Michigan, under which Michigan Carton Co. originally had been created, the entity that had been known as Michigan Carton Co. went out of legal existence as of December 31, 1974, the date of the merger, and the liabilities of the former Michigan Carton Co. were imposed upon, and became the liabilities of, St. Regis Paper Company, as provided by Section 450.53 of the Michigan Corporation Act, of which a copy is printed as Appendix F to this Petition.

6. On or about February 3, 1975, the Petitioner, St. Regis Paper Company, filed in the Circuit Court of Cook County, State of Illinois, in said Case No. 74 CH 321, a "Motion By St. Regis Paper Company for Substitution

of It for Michigan Carton Co. As Party Defendant and As Counterclaimant in This Action", together with the Certificates above identified in paragraph 4 and of which copies appear as Appendix G and Appendix H to this Petition.

7. On or about April 17, 1975, the Petitioner filed in the Circuit Court of Cook County, State of Illinois, in said Case No. 74 CH 321, a "Motion by St. Regis Paper Company for Dismissal of This Action by Reason of the Non-Existence of the Original Defendant, Michigan Carton Co."

8. On June 23, 1975, the said Circuit Court of Cook County, State of Illinois, by Circuit Judge Daniel A. Covelli, denied without opinion both said Motion To Substitute (referred to in paragraph 6 above) and said Motion To Dismiss (set forth in paragraph 7 above).

9. Fourteen days thereafter and on July 7, 1975, the Petitioner, St. Regis Paper Company, filed in the United States District Court for the Northern District of Illinois, Eastern Division, a Petition for Removal, there identified as Case No. 75 C 2210, praying for the removal of said action in the Cook County Circuit Court, Action No. 74 CH 321 to the said United States District Court under the provisions and authority of 28 U.S.C. 1441, following the procedure for removal set forth in 28 U.S.C. 1446.

10. On November 7, 1975, the United States District Court for the Northern District of Illinois, Eastern Division, by Judge Thomas R. McMillen, remanded the said action to the Cook County Circuit Court by the Decision On Motion To Remand dated November 7, 1975, a copy of which is printed as Appendix C to this Petition. On March 4, 1976, the Seventh Circuit Court of Appeals by denying the Petition For Writ Of Mandamus, refused to order vacated that remand by the District Court.

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11. A timely appeal was not filed by Petitioner, St. Regis Paper Company, from the said remand of November 7, 1975 by reason of the deprivation of the right of appeal set forth in 28 U.S.C. 1447(d) providing:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

12. On January 20, 1976, the United States Supreme Court rendered its decision in the case of *Thermtron Products, Inc., et al. v. Hermansdorfer, U. S. District Judge*, Case No. 74-206, not yet officially published, wherein it was held that the Sixth Circuit Court of Appeals did have jurisdiction to issue a Writ of Mandamus directed to the District Judge of the United States District Court for the Eastern District of Kentucky relative to the District Judge's prior order remanding the action there to the State court, notwithstanding the statutory deprivation on the right of appeal as stated in 28 U.S.C. 1447(d).

13. The Supreme Court, by said *Thermtron Products* decision, has in effect held it to be an error, remediable by a Writ of Mandamus, for a District Judge to remand to a State court, an action in which there was possessed by a petitioner a legal right of removal by reason of the presence of diversity of citizenship and required amount involved.

14. In the instant action under review, there is diversity of citizenship. St. Regis Paper Company, the sole party on one side of the controversy, is a citizen of New York by virtue of its incorporation under the laws of New York. The Upgrade Corporation, one of the three parties

on the opposite side of the controversy, is a citizen of Illinois by virtue of its incorporation under the laws of Illinois and is also a citizen of Michigan by virtue of having its principal place of business in Michigan, as provided by 28 U.S.C. 1332(c). American Pulp Corporation, also one of the three parties on said opposite side of the controversy, is a citizen of Michigan by virtue of its incorporation under the laws of Michigan. Bud Bender, also one of the three parties on said opposite side of the controversy, is a citizen of Michigan by virtue of his permanent residence and domicile being at Kalamazoo, Michigan. None of the three parties on said opposite side of the controversy is a citizen of New York.

15. Michigan Carton Co., originally incorporated under the laws of Michigan, the original defendant in the action as filed in the Cook County Circuit Court, is not, and has not been since December 31, 1974, a party to said controversy. By virtue of its merger on December 31, 1974 into St. Regis Paper Company, and by virtue of the provisions of Section 450.53 of the Michigan Corporation Act (Appendix F to this Petition), Michigan Carton Co. went out of legal existence as of December 31, 1974 (although claims against, and liabilities of, Michigan Carton Co. were pursuable against, and assumed by, St. Regis Paper Company under the terms of the merger and under the terms of said Section 450.53 of the Michigan Corporation Act).

16. The amount involved in the controversy is in excess of $10,000.00, exclusive of interest and costs. The original action as filed prayed for an injunction and damages in the amount of $5,000,000.00. The counterclaim filed in the action prayed for damages in the amount of $96,577.24 with interest, plus punitive and exemplary damages.

17. Under the provisions of Article III, Section 2 of the United States Constitution, the judicial power of the

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United States "shall extend to all Cases, in Law and Equity, * * * to Controversies * * * between Citizens of different States", and under the provisions of 28 U.S.C. 1332, the United States District Courts "have original jurisdiction of all civil actions where the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States". The United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction over the subject action.

18. St. Regis Paper Company proceeded diligently throughout in proceeding with the removal of the subject action from the Circuit Court for Cook County, having sought to reform the pleading there to reflect the true position of the parties by promptly serving and filing in the Cook County Circuit Court, its Motion For Substitution Of St. Regis Paper Company For Michigan Carton Co., which motion was not ruled upon by the Circuit Court until June 23, 1975 when it was denied without opinion by Circuit Judge Daniel A. Covelli. Promptly thereafter and on July 7, 1975, St. Regis Paper Company filed in the United States District Court For The Northern District of Illinois, its Petition For Removal upon the basis that, notwithstanding the denial of the said Motion to Substitute, St. Regis Paper Company was in fact and in truth the sole party on one side of the controversy, in the place and stead of the original defendant, Michigan Carton Co. Said Petition For Removal was filed in accordance with the provisions of the second paragraph of 28 U.S.C. 1446(b) reading as follows:

> "If the case stated by the *initial* pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, *order or other paper* from which it may first

be ascertained that the case is one which is or *has become* removable."

19. The Order Of Remand made on November 7, 1975 by Respondent was not on the basis of the statute providing for remand to a State court only in the event that, as set forth in 28 U.S.C. 1447(c),

> "If at any time before final judgment it appears that the case was removed *improvidently and without jurisdiction* * * *".

In this case, the case was not removed improvidently and without jurisdiction. The statutory requirement that the case was removed improvidently and without jurisdiction is not found in the Order Of Remand.

20. The United States District Court, the Court of Appeals, and this Supreme Court are not bound by erroneous factual and legal conclusions of the Cook County Circuit Court in denying the Motion To Substitute filed by St. Regis Paper Company, nor by the alignment of the parties stated in the caption of the case in the Cook County Circuit Court, but the Federal Courts are free to determine the true identity of the parties and their adverse positions in the controversy.

21. The Order Of Remand made by the Respondent, remanding this case to the Cook County Circuit Court, is in conflict with the January 20, 1976 decision of the Supreme Court in *Thermtron Products, Inc.*, Case No. 74-206, is inconsistent with the principle enunciated in that decision, and is contrary to the spirit of the Constitutional provision and the statutory provision affording to a party involved in a controversy between citizens of different States the legal right to have the controversy tried in a Federal Court.

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22. There has been a deprivation of the Petitioner's right of review by appeal or otherwise of an order denying it the right of access to the Federal courts, even though the jurisdictional grounds of diversity and amount in controversy are present, by the terms of 28 U.S.C. 1447(d), while at the same time expressly permitting a right of review by appeal or otherwise to others whose rights are loosely and broadly referred to as "civil rights" generally.

REASONS FOR GRANTING WRIT

1. The Petitioner's Right Under the Federal Statutes to Have Tried in the District Court the Action Pending in the State Court and Which Involves a Controversy Between Citizens of Different States, Is Not to Be Denied by Any Ruling in the State Court Refusing to Recognize the Diversity of Citizenship and by Unduly Delaying Its Ruling of Refusal to Recognize Such Diversity.

Promptly after the merger of Michigan Carton Co. into St. Regis Paper Company, the sole surviving corporation, and Petitioner herein, St. Regis Paper Company proceeded with the filing in the Cook County Circuit Court of a motion to substitute St. Regis Paper Company for the original defendant, Michigan Carton Co., in the pending action, and a motion to dismiss Michigan Carton Co. as defendant by reason of the non-existence of the Michigan Carton Co.

The Circuit Court delayed any ruling on those motions until June 23, 1975 when the Court, by Circuit Judge Daniel A. Covelli, denied the motions without opinion. Promptly thereafter on July 7, 1975, Petitioner filed its Petition For Removal in the District Court For Northern

Illinois, Eastern Division, on the basis that in truth and in fact the pending action was a controversy between citizens of different states. This was done in spite of the refusal of the State Court to permit amendment of the pleadings to show that St. Regis Paper Company, a New York corporation, was legally the present defendant, and that all other parties, citizens of Michigan, were aligned on the other side of the controversy.

A party is not to be deprived of its legal right of removal to a Federal Court by action of a State Court wherein the action arose. It is in the power and duty of a Federal Court to decide on the true facts as to whether or not an action is properly removable under the provisions of 28 U.S.C. 1441. The Federal Courts are not bound by the arbitrary ruling of the Cook County Circuit Court as to who the real defendant is in the action. Removability is a *Federal* question and an obstacle to the determination of that question cannot be imposed by a State Court.

Federal Courts are not confined in determining the question of removability by the mere designation of nominal parties in a case. Rather, the Federal Courts look to the identity of the true and real parties in an action, and as to whether those true and real parties are citizens of different States and are actually on opposite sides of the controversy. In this case, Petitioner, a citizen of New York, is the true and real defendant in the controversy.

The decisions make it clear that the Federal Courts should disregard the formal alignment and designation of parties as found in the pleadings in the Cook County Circuit Court, (over the repeated objections of Petitioner) and instead should be guided by the true facts as to who the true and real parties are in the controversy. A Federal Court is not bound by the erroneous or mistaken rulings of the Cook County Circuit Court in retaining a

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non-existing Michigan Carton Co. as a defendant in the action and in refusing to substitute Petitioner, the actual party, in the place and stead of Michigan Carton Co.

It has been held that denomination of parties as given in the State Court action is not binding on the Federal Court, but rather the Federal Court is obliged to examine the underlying, substantive interests of parties in dispute. In the past the District Courts have not hesitated to look to the facts and to realign and designate the parties to a controversy in accordance with those facts:

> *First National Bank of Chicago v. Mottola*, 302 F. Supp. 785 (D.Ct. Ill. 1969), *affirmed* 465 F.2d 343 (7th Cir. 1972)

The District Courts in determining removability are not required to consider nominal parties (such as the extinct former Michigan Carton Co.):

> *Stonybrook Tenants v. Alpert*, 194 F. Supp. 552 (D. Ct. Conn. 1961)

Nominal or formal parties named in the original pleadings are to be disregarded and only the indispensable real parties in interest are to be considered in determining removability:

> *Marsden v. Southern Flight Service*, 192 F. Supp. 418 (D.Ct. N.C. 1961)

In determining the question of removability, a District Court is to consider the actual interests of parties to the controversy and is to realign them accordingly:

> *Gratz v. Murchison*, 130 F. Supp. 709 (D.Ct. Del. 1955)

Only the actual and indispensable parties to the controversy, and not the nominal or formal parties named in the pleadings, are to be considered in ruling upon removability:

> *Kopitko v. J. T. Flagg Knitting*, 111 F. Supp. 549 (D.Ct. N.Y. 1953)

The District Court's full acceptance of the ruling of the Circuit Court on the question of diversity is reflected in its order of remand (Appendix C) wherein the District Court stated:

> "In any event, when the Circuit Court of Cook County denied the motion to substitute on June 23, 1975, this order made it clear that diversity did not exist and is entitled to recognition in this Court."

The dilatory action of the Cook County Circuit Court in delaying its decision, and then refusing to recognize the undisputed and established fact that St. Regis Paper Company was the real defendant, and that the original defendant, Michigan Carton Co., was extinct, are not properly to be utilized in the Federal Court as a bar or excuse for depriving Petitioner of its legal right to have this action tried in a Federal Court.

2. When the Requirements for Remand to a State Court As Set Forth in 28 U.S.C. 1447(c) Were Not Present, the District Court Was Without Authority to Remand the Action to the State Court.

The only grounds for a remand is found in 28 U.S.C. 1447(c) which states that an action shall be remanded if it was "removed improvidently and without jurisdiction." Upon it being undisputed that there was Federal jurisdiction over the controversy pending in the State Court, its removal could not have been improvident. If it later

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developed that there was not diversity of citizenship or that the required minimum amount was not present, then the removal would then appear to have been improvident.

In this case, the essential statutory requirements for a remand were absent, and the remand was without authority.

The District Court itself did not find that there was not diversity, and hence no jurisdiction, but instead delegated this decision to the State Court and then adopted the decision of the State Court.

There is a hint, but not an unequivocal holding, in the order of remand (Appendix C) that perhaps the Petitioner was tardy in proceeding with the removal. Petitioner acted diligently in proceeding with the removal. It attempted to have the pleadings reformed in the State Court to show the proper and actual alignment of the parties reflecting the diversity of citizenship. This attempt in the State Court failed after a long unexplained delay in the State Court in finally making its decision on this attempt.

The District Court itself was uncertain and indefinite in stating just what the time period was for Petitioner to act in seeking to remove. The District Court in its November 7, 1975 order of remand (Appendix C), equivocally referred to this time period by the remark:

> "The motion from which the merger of Michigan Carton into St. Regis was first apparent was filed in the Circuit Court of Cook County on February 3, 1975 with respect to a merger which occurred on December 31, 1974. It is at *this time*, therefore, that the thirty day period for removal *probably* began to run."

The purpose of the statute governing removal is to assure against dilatory tactics on the part of the remov-

ing party. It cannot reasonably be said that Petitioner was dilatory in any manner. It proceeded with all appropriate steps in a diligent manner for an orderly removal of the action to the District Court. Petitioner is not to be charged with the unexplained delay of the Cook County Circuit Court in reaching its decision.

It seems manifest that there was not the required basis for a remand in this case, in that on the record the action had not been removed by Petitioner "improvidently and without jurisdiction", the only basis for remand sanctioned by the provisions of 28 U.S.C. 1447(c).

3. The Denial, Without Opinion, by the Seventh Circuit Court of Appeals of the Petition for Writ of Mandamus Seeking to Rectify the Improper Remand by the District Court Was an Improper Denial of Its Jurisdiction to Review and Correct the Action by the District Court in Remanding the Action.

In this Supreme Court's January 20, 1976 decision in *Thermtron Products, Inc. v. H. David Hermansdorfer, Judge*, Case No. 74-206 (not yet officially reported, but appearing in the United States Law Week of January 20, 1976, Volume 44, No. 28), the principle enunciated appears to be that, notwithstanding the deprivation of the right of review by appeal or otherwise of an order of remand, as stated in 28 U.S.C. 1447(d), a Court of Appeals does have jurisdiction to rectify an erroneous remand that has been made on grounds other than the specific grounds set forth in the statute, 28 U.S.C. 1447(c).

The erroneous grounds for the remand by the District Court in the *Thermtron Products* decision were that the docket of the District Court was more crowded than that of the State Court and the failure to remand would cause

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a delay in the trial of the action. The erroneous grounds for the remand by the District Court in the instant case were that the State Court had ruled, notwithstanding the undisputed facts of record and the controlling law, that Petitioner was not the real party plaintiff in the place and stead of the extinct Michigan Carton Co. and hence that diversity of citizenship did not appear. The grounds relied upon by the District Court for its remand in the instant case, as in the *Thermtron Products* case, are not the grounds upon which a remand may be made under the terms of the controlling statute.

Congress did not add, in enacting 28 U.S.C. 1447(c) governing remands, the provision that remands are to be based upon actions taken by the State Court on the questions determining diversity of citizenship. Congress did not delegate such authority to govern the jurisdiction of the Federal Courts to discretion by a State Court. Rather, Congress in 28 U.S.C. 1447(c) provided that the decision of whether or not an action was removed "improvidently and without jurisdiction" is a decision for the *District Court.*

Since the District Court here remanded the action to the Cook County Circuit Court on grounds not expressly provided for in 28 U.S.C. 1447(c), the Seventh Circuit Court of Appeals had jurisdiction and the responsibility to rectify that serious error just as did the Sixth Circuit Court of Appeals in the *Thermtron Products* case.

The failure of the Seventh Circuit Court of Appeals to act in accordance with the principle enunciated in the *Thermtron Products* case should be reviewed by this Supreme Court and corrected by a reversal.

4. The Deprivation of the Right of Review by Appeal or Otherwise to Petitioner Seeking to Assert Its Legal Right to Access to the Federal Courts by a Review of the Order of Remand, a Right Not Denied to Other Citizens, Is a Denial of Equal Protection of the Laws and Hence a Denial of Due Process of Law.

While denying the right of review by appeal or otherwise to a citizen claiming the civil right of access to the Federal Courts for such review, 28 U.S.C. 1447(d) makes a discriminatory exception so as to permit such review by appeal or otherwise of orders remanding actions involving other citizens whose rights may be categorized as "civil rights" generally. There appears to be no rational or proper basis for the deprivation of Petitioner's right to review of the District Court's order of remand while at the same time expressly permitting such a review in actions wherein there is involved a person's civil right other than the right of equal access to the Federal Courts. A civil right is a legal right accorded to all citizens and is not confined to any particular class or kind of legal right.

Congress in its enactment of 28 U.S.C. 1447(d) denying to Petitioner the right of review of District Court's erroneous order of remand, while granting the right of such review to other citizens whose civil rights may have happened to be of a particular class or kind, denied to Petitioner the protection of equal treatment of the laws.

Although the Fourteenth Amendment to the United States Constitution forbids the States from denying the "equal protection of the laws" to citizens within its jurisdiction, and the Fifth Amendment to the Constitution forbids the Federal Government from depriving a citizen of "life, liberty, or property, without due process of law", this Supreme Court has held that discrimination in the

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equal application of the laws to citizens may also be a violation of due process. In a 1954 decision involving a Federal action, as distinct from a State action, occurring in the District of Columbia, this Court held that the "equal protection of the law" referred to in the Fourteenth Amendment also applied to actions by the Federal Government and was to be included in the requirement for "due process of law" to which all citizens are entitled. In that decision this Supreme Court said:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."
>
> *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954)

Applying the same principle here, it should be held that the deprivation of Petitioner's right of review from the order of mandate was properly reviewable and the Court of Appeals should have granted the Petition for a Writ of Mandamus. The denial of the Petition for a Writ of Mandamus, without opinion and without a hearing, was a denial of such a review.

28 U.S.C. 1447(d) in discriminating against Petitioner seeking to have reviewed the District Court's erroneous order of remand, while granting such right of review to other citizens, is an unconstitutional denial to Petitioner

of access to the Federal Courts in violation of due process of law.

The action of the Seventh Circuit Court of Appeals correspondingly depriving Petitioner of such right of review by summarily denying, without opinion or hearing, the Petition for Writ of Mandamus, is a confirmation by the Court of Appeals of such denial of the right of review in accordance with the statute, 28 U.S.C. 1447(d), in violation of due process of law.

The Court of Appeals action should be reviewed and reversed by this Supreme Court.

CONCLUSION

The situation presented by this Petition For Writ Of Certiorari is worthy of consideration by grant of the Writ Of Certiorari.

Petitioner should not be deprived of its right to have this action, over which the Federal Court clearly has jurisdiction by reason of diversity of citizenship, tried in the District Court.

The right of review of the erroneous order of remand by this District Court should not be denied on the basis of the discrimination set forth in the statute as reflected by the denial of the requested review by the order refusing, without opinion or hearing, the Petition for Writ of Mandamus.

The grant of this Petition for a Writ of Certiorari is in this instance fully warranted.

Respectfully submitted,

BRUCE B. KROST
CHARLES R. RUST
WOODLING, KROST, GRANGER & RUST
and
CLYDE H. HAYNES
Attorneys for Petitioner

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APPENDIX A

Order of Court of Appeals Denying Petition for Writ of Mandamus

(Dated March 4, 1976)

No. 76-1136

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ST. REGIS PAPER COMPANY,
Petitioner,

vs.

THOMAS R. McMILLEN, Judge, United States District Court for the Northern District of Illinois, Eastern Division,
Respondent.

On consideration of the petition for writ of mandamus filed herein on February 11, 1976 by counsel for the petitioner,

IT IS ORDERED that said petition be, and the same is hereby, DENIED.

APPENDIX B

Petition for Writ of Mandamus Filed in Court of Appeals

(Filed February 11, 1976)

No. 76-1136

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ST. REGIS PAPER COMPANY,
Petitioner,

v.

THOMAS R. McMILLEN, Judge, United States District Court for the Northern District of Illinois, Eastern Division,
Respondent.

PETITION FOR WRIT OF MANDAMUS TO HONORABLE THOMAS R. McMILLEN, UNITED STATES DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

To the Honorable United States Circuit Judges of the United States Court of Appeals for the Seventh Circuit:

1. The Petitioner, St. Regis Paper Company, a corporation of the State of New York having its principal place of business at New York, New York, respectfully petitions for a Writ of Mandamus directing the Respondent, Honorable Thomas R. McMillen, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to vacate the November 7, 1975 Order

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and Decision On Motion To Remand, of which a copy is attached hereto as Exhibit A, wherein the Respondent ordered remanded to the Circuit Court of Cook County, Illinois, the pending action entitled in the United States District Court for the Northern District of Illinois, Eastern Division, as:

UPGRADE CORPORATION and AMERICAN PULP CORPORATION, Plaintiffs-Respondents,	)	
v.	)	
ST. REGIS PAPER COMPANY, Petitioner,	)	CASE NO.
(MICHIGAN CARTON CO., Original Defendant, but since merged into St. Regis Paper Company.),	)	75 C 2210
and	)	
BUD BENDER, Additional Defendant-Respondent.	)	

2. On or about January 17, 1974, an action was commenced against the original defendant, Michigan Carton Co., in the Circuit Court of Cook County, Illinois, entitled *The Upgrade Corporation and American Pulp Corporation v. Michigan Carton Co.*, Case No. 74 CH 321.

3. On or before February 15, 1974, the original defendant, Michigan Carton Co., a corporation of the State of Michigan, filed in the United States District Court for the Northern District of Illinois, Eastern Division, a Petition for Removal of Said Case No. 74 CH 321 from the Cook County Circuit Court upon the grounds that The Upgrade Corporation, a corporation of the State of Illinois, was in fact the adverse party in the principal action.

(The other plaintiff, American Pulp Corporation being a Michigan corporation, as was Michigan Carton Co.) That proceeding on removal was identified in the District Court as Case No. 74 C 440.

4. On or about July 8, 1974, the United States District Court for the Northern District of Illinois, Eastern Division, by then District Judge Philip W. Tone, in said proceeding on removal, Action No. 74 C 440, remanded, without opinion, the action to the Cook County Circuit Court, and on August 9, 1974 denied a motion for reconsideration of the order of remand.

5. On December 31, 1974, the said original defendant, Michigan Carton Co., (having theretofore been a subsidiary of St. Regis Paper Company) was merged with St. Regis Paper Company, the Petitioner herein. As a result of said merger, St. Regis Paper Company, the New York corporation, became the sole surviving corporation, and the original defendant, Michigan Carton Co. that had been a Michigan corporation, became extinct as of December 31, 1974. Upon said merger, St. Regis Paper Company succeeded to all the assets and all of the liabilities of the former Michigan Carton Co., and stands in the place and stead of the former Michigan Carton Co. Copies of the Certificate of the Secretary of the State of New York Of The Merger Of Michigan Carton Co. Into St. Regis Paper Company under the laws of New York, and a copy of the Certificate of the Director of the Michigan Department Of Commerce of the Merger between Michigan Carton Co. and St. Regis Paper Company, a New York corporation, which is the surviving corporation, are attached hereto as Exhibits B and C, respectively.

6. The original claim against Michigan Carton Co. persists after said merger and the right to pursue such claim was not lost by the merger. Under the laws of the

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State of Michigan, under which Michigan Carton Co. originally had been created, the entity that had been known as Michigan Carton Co. went out of legal existence as of December 31, 1974, the date of the merger, and the liabilities of the former Michigan Carton Co. were imposed upon, and became the liabilities of, St. Regis Paper Company, as provided by Section 450.53 of the Michigan Corporation Act, of which a copy is attached hereto as Exhibit D.

7. On or about February 3, 1975, the Petitioner, St. Regis Paper Company, filed in the Circuit Court of Cook County, State of Illinois, in said Case No. 74 CH 321, a "Motion By St. Regis Paper Company For Substitution Of It For Michigan Carton Co. As Party Defendant And As Counterclaimant In This Action", together with the Certificates above identified in paragraph 5 and of which copies appear as Exhibits B and C attached hereto.

8. On or about April 17, 1975, the Petitioner filed in the Circuit Court of Cook County, State of Illinois, in said case No. 74 CH 321, a "Motion By St. Regis Paper Company For Dismissal Of This Action By Reason Of The Non-Existence Of The Original Defendant, Michigan Carton Co."

9. On June 23, 1975, the said Circuit Court of Cook County, State of Illinois, by Circuit Judge Daniel A. Covelli, denied without opinion both said Motion To Substitute (referred to in paragraph 7 above) and said Motion To Dismiss (set forth in paragraph 8 above).

10. Fourteen days thereafter and on July 7, 1975, the Petitioner, St. Regis Paper Company, filed in the United States District Court for the Northern District of Illinois, Eastern Division, a Petition For Removal, there identified as Case No. 75 C 2210, praying for the removal of said action in the Cook County Circuit Court, Action No.

74 CH 321 to the said United States District Court under the provisions and authority of 28 USC 1441, following the procedure for removal set forth in 28 USC 1446.

11. On November 7, 1975, the United States District Court for the Northern District of Illinois, Eastern Division, by Judge Thomas R. McMillen, remanded the said action to the Cook County Circuit Court by the Decision On Motion To Remand dated November 7, 1975, a copy of which is attached hereto as Exhibit A.

12. A timely appeal was not filed by Petitioner, St. Regis Paper Company, from the said remand of November 7, 1975 by reason of the limitation set forth in 28 USC 1447(d) providing:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

13. On January 20, 1976, the United States Supreme Court rendered a decision, of which a copy is attached hereto as Exhibit E, in the case of *Thermtron Products, Inc., et al. v. Hermansdorfer, U. S. District Judge*, Case No. 74-206, wherein it was held that the Sixth Circuit Court of Appeals did have jurisdiction to issue a Writ of Mandamus directed to the District Judge of the United States District Court for the Eastern District of Kentucky relative to the District Judge's prior order remanding the action there to the State court, notwithstanding the statutory limitation on the right of appeal as stated in 28 USC 1447 (d).

14. The Supreme Court by said Thermtron Products decision (Exhibit E) has in effect held it to be an error,

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remediable by a Writ of Mandamus, for a District Judge to remand to a State court an action in which there was possessed by a petitioner a legal right of removal by reason of the presence of diversity of citizenship and required amount involved.

15. In the instant action under review, there is diversity of citizenship. St. Regis Paper Company, the sole party on one side of the controversy, is a citizen of New York by virtue of its incorporation under the laws of New York. The Upgrade Corporation, one of the three parties on the opposite side of the controversy, is a citizen of Illinois by virtue of its incorporation under the laws of Illinois and is also a citizen of Michigan by virtue of having its principal place of business in Michigan, as provided by 28 USC 1332(c). American Pulp Corporation, also one of the three parties on said opposite side of the controversy, is a citizen of Michigan by virtue of its incorporation under the laws of Michigan. Bud Bender, also one of the three parties on said opposite side of the controversy, is a citizen of Michigan by virtue of his permanent residence and domicile being at Kalamazoo, Michigan. None of the three parties on said opposite side of the controversy is a citizen of New York.

16. Michigan Carton Co., originally incorporated under the laws of Michigan, the original defendant in the action as filed in the Cook County Circuit Court, is not, and has not been since December 31, 1974, a party to said controversy. By virtue of its merger on December 31, 1974 into St. Regis Paper Company, and by virtue of the provisions of Section 450.53 of the Michigan Corporation Act (Exhibit D), Michigan Carton Co. went out of legal existence as of December 31, 1974 (although claims against, and liabilities of, Michigan Carton Co. were pursuable against, and assumed by, St. Regis Paper Company under

the terms of the merger and under the terms of said Section 450.43 of the Michigan Corporation Act).

17. The amount involved in the controversy is in excess of $10,000.00, exclusive of interest and costs. The original action as filed prayed for an injunction and damages in the amount of $5,000,000.00. The counterclaim filed in the action prayed for damages in the amount of $96,-577.24 with interest.

18. Under the provisions of Article III, Section 2 of the United States Constitution, the judicial power of the United States "shall extend to all Cases, in Law and Equity,—to Controversies—between Citizens of different States", and under the provisions of 28 USC 1332, the United States District Courts "have original jurisdiction of all civil actions where the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States". The United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction over the subject action.

19. St. Regis Paper Company proceeded diligently throughout in proceeding with the removal of the subject action from the Circuit Court for Cook County, having sought to reform the pleading there to reflect the true position of the parties promptly serving and filing in the Cook County Circuit Court, its Motion For Substitution Of St. Regis Paper Company for Michigan Carton Co., which motion was not ruled upon by the Circuit Court until June 23, 1975 when it was denied without opinion by Circuit Judge Daniel A. Covelli. Promptly thereafter and on July 7, 1975, St. Regis Paper Company filed in the United States District Court For The Northern District of Illinois, its Petition For Removal upon the basis that, notwithstanding the denial of the said Motion to Substitute, St. Regis Paper Company was in fact and in truth the sole party on

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one side of the controversy, in the place and stead of the original defendant, Michigan Carton Co. Said Petition For Removal was filed in accordance with the provisions of the second paragraph of 28 USC 1446(b) reading as follows:

> "If the case stated by the *initial* pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, *order or other paper* from which it may first be ascertained that the case is one which is or has become removable."

20. The Order Of Remand made on November 7, 1975 by Respondent was not on the basis of the statute providing for remand to a State court only in the event that, as set forth in 28 USC 1447 (c),

> "If at any time before final judgment it appears that the case was removed *improvidently and without jurisdiction* * * *"

In this case, the case was not removed improvidently and without jurisdiction. The statutory requirement that the case was removed improvidently and without jurisdiction is not found in the Order of Remand.

21. The United States District Court and this Court of Appeals are not bound by erroneous factual and legal conclusions of the Cook County Circuit Court in denying the Motion To Substitute filed by St. Regis Paper Company, nor by the alignment of the parties stated in the caption of the case in the Cook County Circuit Court, but are free to determine the true identity of the parties and their adverse positions in the controversy.

22. The Order Of Remand made by the Respondent, remanding this case to the Cook County Circuit Court, is

in conflict with the January 20, 1976 decision of the Supreme Court in *Thermtron Products, Inc.* (Exhibit E), is inconsistent with the principle enunciated in that decision, and is contrary to the spirit of the Constitutional provision and the statutory provision affording to a party involved in a controversy between citizens of different States the legal right to have the controversy tried in a Federal Court.

23. This Petition For Writ of Mandamus is brought under the provisions of 28 USC 1651 and of Rule 21 of the Federal Rules of Appellate Procedure, and in accordance with the usages of Law and Equity, all as construed in the light of the said decision of the Supreme Court in *Thermtron Products Inc.* (Exhibit E).

WHEREFORE, Petitioner, St. Regis Paper Company, prays that a Writ of Mandamus may issue out of this Court of Appeals to the Respondent directing him to vacate the November 7, 1975 Decision On Motion To Remand (Exhibit A) remanding the case to the Cook County Circuit Court of Illinois, and to retain the case in said United States District Court.

St. Regis Paper Company,
Petitioner

By /s/ Bruce B. Krost
Woodling, Krost, Granger & Rust
655 Union Commerce Bldg.
Cleveland, Ohio 44115
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150 East 42nd St.
New York, N. Y. 10017

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APPENDIX C-1

Minute Order of the District Court

(Dated November 7, 1975)

No. 75 C 2210

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

THE UPGRADE CORPORATION and
AMERICAN PULP CORPORATION,
Plaintiffs,

vs.

ST. REGIS PAPER COMPANY and
MICHIGAN CARTON COMPANY,
Defendants.

Enter decision that the motion of the plaintiffs to remand this case to the Circuit Court of Cook County is granted & their motion for costs is granted, both motions to be complied with within 30 days hereof. (DRAFT)

APPENDIX C-2

Opinion and Judgment of District Court

(Dated November 7, 1975)

No. 75 C 2210

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

THE UPGRADE CORPORATION and
AMERICAN PULP CORPORATION,
Plaintiffs,

v.

ST. REGIS PAPER COMPANY and
MICHIGAN CARTON COMPANY,
Defendants.

DECISION ON MOTION TO REMAND

Plaintiffs have filed a motion to remand this case to the Circuit Court of Cook County for the second time. The complaint was originally filed there against Michigan Carton Co., was removed here, and then remanded on July 8, 1974 for lack of diversity jurisdiction, since Michigan citizens were on both sides.

After the remand, St. Regis Paper Co., a New York corporation, filed a motion to substitute itself as the party defendant for Michigan Carton Co. on the ground that Michigan Carton Co. had been merged into St. Regis on December 31, 1974. The Circuit Court of Cook County

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denied this motion and also denied a motion to dismiss the complaint as to Michigan Carton Co., on June 23, 1975. Nevertheless, St. Regis removed the case to this court again on July 7, 1975, on the theory that it was the sole defendant and that diversity jurisdiction now existed.

The petition to remove was not timely filed, however, within the provisions of 28 U.S.C. §1446(b). That statute requires that a petition for removal must be filed within thirty (30) days "after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable". The motion from which the merger of Michigan Carton into St. Regis was first apparent was filed in the Circuit Court of Cook County on February 3, 1975 with respect to a merger which occurred on December 31, 1974. It was at this time, therefore, that the thirty day period for removal probably began to run.

In any event, when the Circuit Court of Cook County denied the motion to substitute on June 23, 1975, this order made it clear that diversity did not exist and is entitled to recognition in this court. See *General Investment Co. v. Lake Shore & M S. Railway Co.*, 260 U.S. 261, 267 (1922). Even if the petition for removal were timely, it is improper because of the continued presence of Michigan Carton Co. as a defendant. Furthermore, the status of Michigan Carton Co. as a Michigan corporation is determined by the laws of that state. Although the Michigan Business Corporation Act provides that the debts, liabilities and duties of the surviving corporation are imposed upon the latter, it also provides that any existing claim or action against the merger corporation may be prosecuted as if the merger or consolidation had not taken place. *Michigan Business Corporation Act* (1972), §21.200 (722) Subpar. (2).

Since Michigan Carton Co. was the original defendant in this case and since F.R.C.P. 25(c) permits the action to be continued against the original defendant, the order of the Circuit Court of Cook County is in accord with Michigan and Federal law. The original corporation, even though merged and dissolved, is still a proper defendant. See *Hoefferle Truck Sales Inc. v. Divco-Wayne Corp.*, ... F.2d ..... (7th Cir. No. 74-1481, Oct. 6, 1975, Slip Op. p. 6-7).

Plaintiff has also moved for its costs pursuant to 28 U.S.C. §1447(c). We find and conclude that these should be taxed against the defendant, because the removal was made after the thirty day period of §1446(b) and because defendant flew in the face of an existing and valid decision of the Circuit Court of Cook County, after having been rebuffed once before on the same point. Therefore, before this case is remanded, plaintiff may tax its costs which, after allowance, will follow the case back to the Circuit Court of Cook County.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the plaintiffs to remand this case to the Circuit Court of Cook County is granted, and their motion for costs is granted, both motions to be complied with within thirty (30) days hereof.

ENTER:

/s/ Thomas R. McMillen
Judge, U. S. District Court

APPENDIX D

Constitutional Provisions

Article III, U.S. Constitution

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Amend. V, U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

APPENDIX E

Federal Statutes

28 U.S.C. 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a

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policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. 1441

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. 1443

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. 1446

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

28 U.S.C. 1447

§ 1447. Procedure after removal generally

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

APPENDIX F

State Statute Involved

SECTION 450.53

MICHIGAN CORPORATION ACT

When said agreement shall have become effective, *the separate existence of all of the constituent corporations, or all of such constituent corporations except the resulting corporation, shall cease*, and the constituent corporations shall become a new corporation, or be consolidated or merged into 1 of such corporations in accordance with said agreement. It shall possess all the rights, privileges, powers and franchises, both of a public and a private na-

ture, and be subject to all the restrictions, disabilities and duties of each of such corporations so consolidated or merged. The rights, privileges, powers and franchises of each of said corporations in this state, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, including stock subscriptions, and all other things in action or belonging to each of such corporations, shall be vested in said resulting corporation. All property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of said resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether by deed or otherwise, under the laws of this state, vested in any of such constituent corporations, shall not revert or be in any way impaired by reason of this act. All rights of creditors and all liens upon the property of any of said constituent corporations of this state shall be preserved unimpaired, and *all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said resulting corporation, and may be enforced against it* to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. Any surplus which the constituent corporations may have at the time of such consolidation or merger may be carried as surplus by the resulting corporation. As amended P.A. 1962, No. 155, §1, Eff. March 28, 1963. (Emphasis added)

APPENDIX G

Certificate of Merger in State of New York

(Certification of Copy Omitted in Printing)

CERTIFICATE OF MERGER

OF

MICHIGAN CARTON CO.

INTO

ST. REGIS PAPER COMPANY

Under Section 905 of the Business Corporation Law

The undersigned, Edwin H. Jones, Jr. and Homer Crawford, being, respectively, the Executive Vice President-Finance and Administration and the Secretary of St. Regis Paper Company, a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York, said St. Regis Paper Company owning all of the issued and outstanding shares of the capital stock of Michigan Carton Co., a foreign corporation duly organized and existing under and by virtue of the laws of the State of Michigan, do hereby certify and set forth:

FIRST: The name of each constituent corporation is as follows:

ST. REGIS PAPER COMPANY
MICHIGAN CARTON CO.

SECOND: The name of the surviving corporation, the certificate of incorporation of which was filed by the Department of State on the 4th day of February, 1899, is St. Regis Paper Company.

THIRD: The designation and number of outstanding shares of each class of Michigan Carton Co., all of which are owned by St. Regis Paper Company, the surviving corporation, are as follows:

Designation of Outstanding Shares	Number of Outstanding Shares
Common Stock $10 Par	400,000

FOURTH: (A) Michigan Carton Co. was organized under the laws of the State of Michigan on April 8, 1907.

(B) No Application for Authority in the State of New York of said Michigan Carton Co. to transact business as a foreign corporation therein was filed by the Department of State of the State of New York.

FIFTH: The laws of the State of Michigan, the jurisdiction of incorporation of the subsidiary corporation named herein, permit a merger of the kind certified herein.

SIXTH: (A) The merger of Michigan Carton Co. into St. Regis Paper Company, in accordance with Section 905 and Section 907(c) of the Business Corporation Law of the State of New York, was authorized by the Board of Directors of St. Regis Paper Company at a meeting held on the 18th day of December, 1974, at which a quorum was present and acted throughout.

(B) The merger of the subsidiary corporation named herein into the surviving corporation has been authorized under the laws of the jurisdiction of incorporation of the said subsidiary corporation, and in compliance therewith.

SEVENTH: The effective date of this Certificate of Merger shall be December 31, 1974.

BLEED THROUGH

IN WITNESS WHEREOF, St. Regis Paper Company has caused this Certificate of Merger to be signed in its behalf by its Executive Vice President-Finance and Administration and its Secretary and its corporate seal to be hereunto affixed this 19th day of December, 1974.

St. Regis Paper Company

By: /s/ Edwin H. Jones, Jr.
Executive Vice President-Finance and Administration

By: /s/ Homer Crawford
Secretary

(Verification omitted in printing)

APPENDIX H

Certificate of Merger in the State of Michigan

(Certification of Copy Omitted in Printing)

CERTIFICATE OF MERGER

OF

ST. REGIS PAPER COMPANY
(Name of Parent Corporation)

AND

MICHIGAN CARTON CO.
(Name of Subsidiary Corporation)

Pursuant to the provisions of Sections 711, 712 and 733, Act 284, Public Acts of 1972, as amended, the undersigned St. Regis Paper Company, a corporation organized and existing under the laws of the state of New York (here-

inafter referred to as the "parent corporation") owning all of the outstanding shares of each class of Michigan Carton Co., a corporation organized and existing under the laws of the state of Michigan (hereinafter referred to as the "subsidiary corporation") executes the following certificate of merger:

ARTICLE ONE.

The laws of the jurisdiction under which St. Regis Paper Company is incorporated permit this type of merger.

ARTICLE TWO.

The plan of merger is as follows:

FIRST: (a) The name of each constituent corporations is as follows:

St. Regis Paper Company
150 East 42nd Street
New York, New York 10017

Michigan Carton Co.
79 East Fountain Street
Battle Creek, Michigan 49016

(b) The name of the surviving corporation is St. Regis Paper Company.

BLEED THROUGH

SECOND: As to each constituent corporation, the designation and number of outstanding shares of each class and series and the voting rights thereof are as follows:

Name of Corporation	Designation and number of shares in each class or series outstanding	Indicate class or series of shares entitled to vote	Indicate class or series entitled to vote as a class
St Regis Paper Company	21,735,369 Shares	Common	Each entitled to one vote
St. Regis Paper Company	112,500 Shares	Series A $5.50 Cumulative Convertible Preferred	Each entitled to one vote
Michigan Carton Co.	400,000 Shares	Common	Each entitled to one vote

THIRD: The terms and conditions of the proposed merger, including the manner and basis of converting the shares of each constituent corporation into shares, bonds or other securities of the surviving corporation, or into cash or other consideration, are as follows:

St. Regis Paper Company will surrender to Michigan Carton Co., for cancellation all of the outstanding stock of Michigan Carton Co., and will assume all of the obligations and liabilities of Michigan Carton Co.; and will become the owner of all of the assets, business, property and interests of Michigan Carton Co., by operation of law.

FOURTH: (A statement of any amendment to the articles of incorporation of the surviving corporation to be affected by the merger.)

None.

ARTICLE THREE.

The number of outstanding shares of each class of the subsidiary corporation and the number of shares of each class owned by the parent corporation is as follows:

Class	Total shares outstanding	Shares owned by parent corporation
Common	400,000	400,000

ARTICLE FOUR.

The effective date of the certificate of merger shall be 31st day of December, 1974.

Signed this 19th day of December, 1974.

St. Regis Paper Company
(Name of Parent Corporation)

By /s/ Edwin H. Jones, Jr., Executive Vice President-Finance and Administration

BLEED THROUGH

FILED
MAY 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

Nos. 75-1409

ST. REGIS PAPER COMPANY,

Petitioner,

vs.

THOMAS R. McMILLEN, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

HARRY SHRIMAN,
HERMAN FELDMAN,
111 West Washington Street,
Chicago, Illinois 60602,
Attorneys for Respondent.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

The petition presents two main arguments for review of the orders below. The first argument is that the District Court did have jurisdiction on the basis of diversity of citizenship, and that the Court erred in remanding the cause. The second is that Section 1447(d), in barring review of an order remanding a removed case, deprives petitioner of the equal protection of the laws, in violation of the Constitution.

I.

THE ORDER REMANDING THE CAUSE IS NOT REVIEWABLE.

Petitioner first argues extensively that the District Court erred in finding lack of diversity jurisdiction, and in finding that the

removal was not filed in apt time. It is thus clear that the Court found that the removal was both improvident and without jurisdiction.

Even if there were any merit in the contention that the District Court erred in its findings, Section 1447(d) bars review of the order remanding the case.

At this point, petitioner relies on *Thermtron Products, Inc., et al.* v. *Hermansdorfer*, U. S. Law Week, January 20, 1976, Volume 44, No. 28. The petition (p. 18) states, on the basis of this case, that "a Court of Appeals does have jurisdiction to rectify an erroneous remand that has been made on grounds other than the specific grounds set forth in the statute". However, the decision also expressly confirms and lets stand the "well-established general rule that Section 1447(d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute." Since the order of remand was expressly based on statutory grounds, because of untimely and improvident removal and absence of Federal jurisdiction, Section 1447(d) bars review of any kind.

II.

PETITIONER HAS NOT BEEN DEPRIVED OF ANY CONSTITUTIONAL RIGHTS.

Under the powers granted by Article III of the Constitution, pertaining to the establishment of United States Courts, Congress, by the enactment of Section 1447(d), has prevented review of orders of remand, in a case such as is now before this Court.

Petitioner now for the first time raises the issue of the constitutionality of that section, arguing that petitioner is deprived of the equal protection of the law. Aside from the fact that petitioner did not raise the issue in the Court of Appeals, the iden-

BLEED THROUGH

tical argument was made and rejected in *Baines* v. *City of Danville*, 337 F. 2d 579, 597-598 (1964); *certiorari denied*, 381 U. S. 939, 14 L. Ed. 2d 702.

III.

THIS COURT SHOULD EXERCISE ITS DISCRETION TO ASSESS DAMAGES FOR DELAY.

Rule 56 of this Court provides that where there appears to be no ground for granting the writ of certiorari, this Court, in an appropriate case, may assess reasonable damages for delay. The pending petition appears to present such an appropriate case.

The original suit in the State Court was filed by plaintiffs below in January, 1974, against Michigan Carton Co., which filed a petition for removal on the alleged ground of diversity of citizenship. The cause was then remanded for want of such diversity. Then, after extensive discovery procedures in State Court, St. Regis filed a motion to be substituted as sole defendant therein, by reason of its merger with Michigan Carton Co. The motion was denied. Then petitioner, St. Regis (which is not and never has been a party to the suit) filed a second petition for removal, contending that the merger had created the necessary diversity. The cause was again remanded. Then followed the petition for writ of mandamus, which was denied. By reason of the present petition for certiorari, on motion of St. Regis all proceedings in the State Court have been stayed by that Court, pending this Court's ruling on the present petition.

For the purpose of this part of our response, it seems pertinent to emphasize the following: The merger occurred on December 31, 1974. The second petition for removal was filed on July 7, 1975, more than 6 months after the alleged fact giving rise to the necessary diversity—and thus more than 5 months after the 30-day period prescribed by the statute. Though the removal would have been without jurisdiction in any case, there was nothing in the way of its being filed at any time after December

31, 1974, within the period prescribed by law. Yet petitioner blames the trial judge for the delay, because the judge "delayed any ruling" on the motion of St. Regis to be substituted as sole defendant (Petition, p. 13). We submit that this history and such arguments are relevant in determining whether this is an appropriate case for the application of Rule 56.

The District Court decision (petition, p. 36) calls attention to the fact that "defendant flew in the face of an existing and valid decision of the Circuit Court of Cook County, after having been rebuffed once before on the same point". Here it may similarly be said that petitioner now seeks to fly in the face of the Constitution, the Code, and clearly relevant case law.

We believe the record reveals a pattern of tactics which make this an appropriate case for the assessment of damages for the resulting delays, in keeping with the objectives of the rule.

CONCLUSION.

The order of the District Court, remanding the cause, was correct and proper. The denial of the petition for writ of mandamus was likewise correct and proper. In addition, since the cause was remanded by reason of lack of Federal jurisdiction and because the removal was filed too late, the statute precludes review of the order.

In view of the record of delay caused by St. Regis, this Court should, pursuant to Rule 56, adjudge reasonable damages for such delay.

Respectfully submitted,

HARRY SHRIMAN,
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Attorneys for Respondent.